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[Court of Appeals No. 79933-9]

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

JUSTIN HELMBRECK,

Petitioner,

vs.

PAULA MCPHEE and JOHN DOE MCPHEE, LAURA ELLIOTT and
JOHN DOE ELLIOTT, CITY OF DES MOINES, WASHINGTON,

Respondents.

**RESPONDENT CITY OF DES MOINES'
ANSWER TO PETITION FOR REVIEW**

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I. INTRODUCTION

Respondent City of Des Moines (“City”) opposes the petition of Appellant Justin Helmbreck (“Helmbreck”) for discretionary review of Division One Court of Appeals’ decision in *Helmbreck v. City of Des Moines, et. al.*, No. 79933-9-I.

There are no grounds for review under RAP 13.4(b) (1), (3), or (4). The Court of Appeals’ decision in this case does not conflict with any of this Court’s decisions. The trial court’s order granting summary judgment was based on established legal precedent and the trial court found that Helmbreck did not present any contrary legal authority or material disputed facts to refute the City’s arguments.

The Superior Court and the Court of Appeals correctly ruled that the City had no affirmative duty to inspect its streets and inform itself of dangerous conditions. In addition, the Superior Court and the Court of Appeals correctly determined that the City was not liable because it did not create an unsafe condition and did not have actual or constructive notice of a dangerous condition at the accident location. As both courts noted, the only evidence of notice Helmbreck submitted was the City’s action of removing some vegetation from the right of way three years after the motor vehicle accident.

II. NO ISSUES FOR REVIEW PRESENTED

There is no merit for review. Respondent City presents no additional issues for review.

III. COUNTERSTATEMENT OF THE CASE

A. Facts

On June 7, 2015, Respondent Elliott and Petitioner (Helmbreck) were involved in a motor vehicle accident. The accident occurred at the uncontrolled intersection of S. 212th Street and 1st Place S. in Des Moines. Respondent McPhee owns the home located on the southwest corner of the intersection. *CP 35*. Helmbreck lived just two houses east of this intersection and had lived there for 12 years at the time of the accident. *CP 8, 32*. Helmbreck was 18 on the date of the accident. *Id.* Helmbreck admitted he had driven through the intersection at least 5-10 times before the accident. *Id.*

Helmbreck admitted he could have seen Respondent Elliott's car as he moved past the vegetation on McPhee's property, and he admitted that his vision was not obstructed by the vegetation; he simply did not see Elliott until he hit her. *CP 35, 42, 49*. Helmbreck admitted that he had a duty to yield the right of way at the intersection. *Id.* Helmbreck never complained to anyone about the vegetation located on Respondent McPhee's property before the accident. *CP 34, 37*. Indeed, Helmbreck admitted he did not

speak with anyone about the McPhee vegetation before the accident, and was unaware of anyone complaining that the McPhee vegetation obstructed drivers' views at the intersection. *CP 34-35*. Finally, Helmbreck admitted he was not aware of any accidents occurring at that intersection before this accident. *CP 35*.

There were no complaints about visibility or road conditions at this intersection, and the City had no knowledge of concerns regarding traffic visibility or road conditions at the intersection before this accident. *CP 70, 77*. The vegetation on McPhee's property was installed and maintained by McPhee and her predecessors in interest. *Id.* McPhee had to consistently cut vegetation back on the northeast corner of her property because it grew continually, except in winter. *CP 55-56*.

B. Procedural History

Helmbreck filed a personal injury action on February 1, 2018, naming McPhee as the only defendant. Helmbreck alleged that McPhee was negligent for failing to maintain the vegetation on her property. He amended his complaint on June 13, 2018, adding Respondent Elliott and the City. *3 CP 694, 700; 1 CP 1-5*. Helmbreck's only claim against the City was that it "was negligent in failing to design, construct and maintain safe roadways at the intersection where the collision occurred." *Id.*, ¶4.7.

The City filed a motion for summary judgment in November 2018; the hearing on the City's motion occurred on December 4, 2018. The Superior Court granted the motion and dismissed the City. *1 CP 234*. The Superior Court subsequently denied Helmbreck's motion for reconsideration. *1 CP 302-305*.

The case proceeded to trial against Respondents Elliott and McPhee in February 2019; the jury returned a verdict on March 1, 2019. *CP 2027-2029*. Helmbreck was found 85% liable, Elliott was found 15% liable, and McPhee was found not liable. *Id.* Helmbreck appealed the summary judgment ruling in favor of the City and the trial judgment in favor of Respondents Elliott and McPhee. The Court of Appeals, Division 1 filed its opinion affirming the order on summary judgment and the trial judgment on September 14, 2020.

IV. ARGUMENT

Helmbreck seeks review of the Appellate Court decision affirming the trial court's order granting the City's motion for summary judgment under RAP 13.4(b)(1), (3), and (4). Cited portions of the Rule provide:

A petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

...

- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Helmbreck presents no cognizable argument to support his claim that the Court of Appeals' decision conflicts with a Supreme Court decision. Further, Helmbreck did not raise any state or federal constitutional issues in the trial court or the Court of Appeals, and has not raised a constitutional issue in his Petition for Review. Finally, Helmbreck did not identify a substantial public interest affected by the Court of Appeals' decision that should be determined by this Court. For these reasons, Helmbreck's Petition for Review should be denied.

A. **The Court of Appeals' Decision Is Not in Conflict with a Decision of the Supreme Court**

Helmbreck argues that the City "acknowledged the McPhee vegetation was in the . . . right-of-way with a duty to maintain it." This is simply not true. The record Helmbreck cited to (*CP 69-70*) is the declaration of the City's Public Works Director. The Public Works Director did not acknowledge "a duty to maintain" the right-of-way; the Public Works Director simply states that the City cleared vegetation in the right-of-way, after receiving notice of Helmbreck's accident, in June 2018. *Id.* More importantly, Helmbreck argues that the Court of Appeals erred by

requiring him to prove the City had actual knowledge of a dangerous condition, and that the City had “an additional duty imposed by its own municipal code.” *Pet. for Review*, pg. 7. Helmbreck does not cite any Supreme Court decision to support this argument. Helmbreck contends that the Court of Appeals’ ruling conflicts with *Nguyen v. City of Seattle*, 179 Wn. App. 155, 317 P.3d 518 (2014), because the City “had constructive notice of the dangerous condition.” *Pet. for Review*, pg. 8-9. But *Nguyen* is not a Supreme Court case and therefore does not meet the elements of RAP 13.4(b)(1). Even if *Nguyen* was considered by this Court, Helmbreck relies on the concurring opinion rather than the majority. The majority held that actual or constructive notice must be demonstrated unless the municipality created the unsafe condition, or should have anticipated it. A municipality “must have (a) notice of a dangerous condition which it did not create, and (b) a reasonable opportunity to correct it before liability arises for the negligence from neglect of duty to keep the streets safe.” *Nguyen*, at 164-165. Helmbreck presented no evidence of actual or constructive notice to the City.

Next, Helmbreck claims that the Court of Appeals’ decision in this case conflicts with *Wuthrich v. King County*, 185 Wn.2d 19, 366 P.3d 926 (2016) because “. . . the only requirement in *Wuthrich* was that the vegetation renders the adjacent roadways inherently dangerous.” *Pet. for*

Review, pg. 10. In *Wuthrich*, a motorist was unable to see intersecting traffic because of blackberry bushes growing on the side of the road. She pulled out in front of a motorcyclist and the motorcyclist hit her vehicle. King County argued that it had no duty to remove the roadside blackberry bushes and was dismissed on summary judgment. The Court of Appeals affirmed. However, the Supreme Court reversed based on evidence that the roadside vegetation had been present for years, King County knew about it, and King County was aware of prior accidents at the intersection. *Wuthrich*, at 29.

Here, even though Helmbreck argues there were undisputed facts that McPhee's vegetation blocked motorists' view as they approached the intersection, Helmbreck presented no evidence to support this argument. "The undisputed evidence at the motion for summary judgment was that the vegetation at the McPhee residence changed over time, depending on how quickly the shrubs grew and how often or extensively they were trimmed. There is simply no evidence beyond speculation and conjecture that the City had notice of the allegedly dangerous condition and a reasonable opportunity to correct it before the Helmbreck/McPhee (sic) accident." *Ct. of App. Div. 1 Unpublished Opinion, No. 79933-91, Sept. 14, 2020* at pgs. 8-9.

The Court of Appeals' decision is not in conflict with Wuthrich; it is consistent with Wuthrich. "Helmbreck has provided no authority that the City had a legal duty to inspect the street and inform itself of dangerous conditions. No legal basis has been established for a presumption that the City should have known the vegetation was a dangerous condition." *Ct. of App. Div. 1 Unpublished Opinion, No. 79933-91, Sept. 14, 2020* at pg. 11.

B. Helmbreck Has Not Raised a Significant State or Federal Constitutional Question

Not once, at any stage of this case, has Helmbreck raised a constitutional issue. He does not refer to article or amendment of the Washington State Constitution; he does not refer to any article or amendment of the United States Constitution. He has made no allegations that implicate a constitutional issue; this case is a private action sounding in negligence. Hence, there is no basis for this Court to grant Helmbreck's petition under RAP 13.4(b)(3).

C. Helmbreck Has Not Raised an Issue of Substantial Public Interest

Helmbreck's final claim falls under RAP 13.4(b)(4); a petition for review will be accepted only if it involves an issue of substantial public interest. RAP 3.4(b)(4). "A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and

confusion on a common issue.” *In Re Flippo*, 185 Wn.2d 1032, 380 P.3d 413 (2016). See, also, *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005).

Other examples of substantial public interest issues include the effect of incorrect appellate court holdings on the classification of sex offenders and their removal from the offender registration, *In Re Personal Restraint of Arnold*, 189 Wn.2d 1023, 408 P.3d 1091 (2017); or the conflict between state statutes and the Indian Child Welfare Act to determine termination of the rights of a non-Indian parent, *In Re Adoption of T.A.W.*, 184 Wn.2d 1040, 387 P.3d 636 (2016).


Helmbreck has not raised an issue of substantial public interest. Rather, Helmbreck raises issues that do not conflict with established law regarding notice of a dangerous condition and a municipality’s duty to maintain its streets. There is no basis for this Court to grant Helmbreck’s petition under RAP 13.4(b)(4).

V. CONCLUSION

Helmbreck has not provided a basis for review. The trial court’s order dismissing the City, and the Court of Appeals’ affirmation, were based on established legal precedent. Though Helmbreck cites RAP 13.4(b)(1), (3), and (4) as bases to grant his petition, he has not met the requirements of the Rule. Therefore, his Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 12th day of November, 2020.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing
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s/Karie E. Gill
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Transmittal Information

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